IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR

TUESDAY, THE 29TH MAY 2007 / 8TH JYAISHTA 1929

WP(C).No. 19934 of 2006(W)

PETITIONER:

A. JOSEPH, S/O. LATE M.J. ANTONY,
HEAD ACCOUNTANT, I.C.D.S. OTTAPALAM, PALAKKAD.

BY ADV. SRI.U.BALAGANGADHARAN

RESPONDENTS:
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1. **STATE OF KERALA,**
   REPRESENTED BY SECRETARY TO GOVERNMENT,
   REVENUE (TAXES) DEPARTMENT, GOVT.SECRETARIAT,
   THIRUVANANTHAPURAM.

2. **THE DIRECTOR,**
   STATE LOTTERY DIRECTORATE, THIRUVANANTHAPURAM.

3. **THE DIRECTOR,**
   SOCIAL WELFARE DIRECTORATE, THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI. P. NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.19934/2006 W

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE ORDER DTD. 25/07/1984 ISSUED BY THE 2ND RESPONDENT.**

EXT.P2: **COPY OF THE ORDER DTD. 15/01/1986 ISSUED BY THE 2ND RESPONDENT.**

EXT.P3: **COPY OF THE ORDER DTD. 19/02/1988 ISSUED BY THE 2ND RESPONDENT.**

EXT.P4: **COPY OF THE ORDER DTD. 25/06/1988 ISSUED BY THE 2ND RESPONDENT.**

EXT.P5: **COPY OF THE REPRESENTATION DTD. 30/05/2005 SUBMITTED BY THE PETITIONER TO THE 2ND RESPONDENT.**

EXT.P6: **COPY OF COMMUNICATION DTD. 30/08/2005 ISSUED BY 3RD RESPONDENT TO THE 2ND RESPONDENT.**

EXT.P7: **COPY OF ORDER DTD. 22/06/2006 ISSUED BY THE 2ND RESPONDENT.**

EXT.P8: **COPY OF THE GOVERNMENT ORDER DTD. 15/07/2004.**

2ND RESPONDENT'S EXHIBITS:

EXT.R2(A): **COPY OF THE LETTERS SENT FROM THE GOVERNMENT TO THIS RESPONDENT.**

EXT.R2(B): **COPY OF THE LETTER ISSUED TO THE PETITIONER DTD. 22/06/06.**

EXT.R2(C); **COPY OF THE FINAL GRADATION LIST OF UDC/LDC/CAs/TYPISTS/ ACPs AND PEONS.**

/TRUE COPY/

KSS

K.BALAKRISHNAN NAIR, J.

W.P.(C) NO. 19934 of 2006-W

JUDGMENT

The petitioner was appointed as Lower Division Clerk under the Lottery Directorate of the Kerala Government, on the advice of the P.S.C., on 7.12.1983. His probation was declared in the post of L.D.C with effect from 20.12.1985. He was promoted as U.D.Clerk with effect from 1.3.1987. The petitioner sought inter-departmental transfer to the Department of Social Welfare. That application was allowed by Ext.P4 order dated 25.6.1988 and he joined the Social Welfare Department. On finding that promotion prospects there were poor, the petitioner submitted Ext.P5 representation, seeking repatriation to his parent Department. But, the said representation was rejected by Ext.P7 communication, by the Directorate, relying on the 4th proviso to Rule 8 of K.S. & S.S.R. This Writ Petition is filed, challenging Ext.P7. In support of his submissions, the petitioner relied on Ext.P8 Government order issued, pursuant to the decision of the Apex Court in **Ali v. State of Kerala** [2003(2) K.L.T. 922 (SC)]. The petitioner also relied on the Full Bench decision of this Court in

Balakrishnan Nair v. Ram Mohan Nair [1998(1) KLT 766 FB]. According to him, he has got a lien in the Department of Lotteries. He was not confirmed in the Department of Social Welfare. Therefore, he is entitled to go back, it is submitted.

2. The learned Government Pleader, on the other hand, would submit that the petitioner on his own volition applied and got a posting to the Department of Social Welfare under the terms and conditions contained in G.O.(Ms) No.4/1961. So, he can go back only if there is no post to accommodate him in the Department of Social Welfare or his pay in the parent Department becomes higher than the pay of that post in the transferee Department. None of these conditions are available, it is pointed out, in the petitioner's case. The learned Government Pleader also distinguished the decision of the Full Bench of this Court in **Balakrishnan Nair**'s case, stating that in that case the petitioners were appointed in the Department of Rural Development in exigencies of service and not on the request of the incumbents.

3. Rule 8 of K.S. & S.S.R reads as follows:

> "8. Members absent from duty:--The absence of a member of a service from duty in such service, whether on leave, other than leave without allowances for taking up other employment on foreign service or on deputation or for any other reason and whether his lien in a post borne on the cadre

of such service is suspended or not, shall not, if he is otherwise fit, render him ineligible in his turn--

(a) for re-appointment to a substantive or officiating vacancy in the class, category, grade or post in which he may be a probationer or an approved probationer;

(b) for promotion from a lower to a higher category in such service; and

(c) for appointment to any substantive or officiating vacancy in another service for which he may be an approved candidate;

as the case may be, in the same manner as if he has not been absent. He shall be entitled to all the privileges in respect of appointment, seniority, probation and appointment as full member which he would have enjoyed but for his absence:

Provided that subject to the provisions of rule 18 he shall satisfactorily complete the period of probation on his return:

Provided further that a member of a service who is appointed to another service and is a probationer or an approved probationer in the latter service, shall not be appointed under clause (c) to any other service for which he may be an approved candidate unless he relinquishes his membership in the latter service in which he is a probationer or an approved probationer:

Provided further that this rule shall not have retrospective effect so as to disturb the decisions taken by the Travancore-Cochin Government in respect of the Travancore-Cochin personnel:

Provided also that this rule shall not apply in the case of a member of a service whose absence from duty in such service is by reason of his appointment to another service not being Military service, solely on his own application, unless such appointment is made in the exigencies of public service.

Note-1:- An appointment made in pursuance of applications invited, sponsored or recommended by Government or other competent authority shall be deemed go

be an appointment made in the exigencies of Public Service for the purpose of this rule.

Note-2:- The benefit of this rule shall not be available to a person holding a post in any class or category in a service if his appointment to that post was from a post in another class or category in the same service."

The relevant portion of G.O.(Ms) No.4/61 reads as follows:

"In supersession of the orders in the G.O cited, the Government direct, in consultation with the Kerala Public Service Commission, that mutual or inter-departmental transfers of Government servants from one unit to another within the same Department, or from one Department to another within the same Subordinate Service may be ordered by the Appointing Authorities concerned on request, subject to the following conditions:--

(1) A person transferred to a new unit will take rank below the juniormost in the category in the new Unit or Department. He will not be allowed to count his previous service towards seniority. Such transfers should not be prejudicial to the legitimate interest of anyone in the department to which he is transferred. But he may be allowed to count his previous service towards increment, leave, pension, gratuity, etc. He will not be required to undergo fresh probation, if he has already completed probation.

(2) A permanent person need to be required to relinquish his permanency. He may be permitted to retain his permanent lien in the old post until he is confirmed in the new unit or department; but he can come back to the old unit or department only if and when there is no vacancy for him to continue in the new unit, or if for any reason his pay in the substantive post in the parent Department becomes higher than the pay of the new post held by him.

(3) Transfers should be made only in cases in which the posts concerned carry the same scale of pay and have the same qualifications and method of recruitment prescribed.

(4) Persons transferred from one department to another

> or from one unit to another in the same department due to administrative reasons will retain all their rights in the old unit or department, as the case may be.
>
> (5) In the case of transfers other than those coming under item (4) above, no T.A., or joining time pay will be allowed whether at the time of first transfer or at the time of reversion to the parent Department.
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> 2. If any exception from the above procedure has to be made in any case, the concerned Head of the Department may forward to Government detailed proposals showing the special reasons for making such exception. Government will then, in consultation with the Public Service Commission, where necessary issue appropriate orders in such cases."

The petitioner's claim has to be considered in the light of the above quoted Rule and the Government order. It is not disputed that the petitioner is not confirmed in the Social Welfare Department. It is also common case that the petitioner has been appointed in the Department of Social Welfare on his application and that too, subject to the conditions contained in G.O.(Ms) No.4/61. So, he is governed by the 4th proviso to Rule 8. Therefore, the Full Bench decision of this Court cannot have any application to the facts of this case. The petitioner does not have a case that he is not having a post in the Social Welfare Department and therefore, he is going to be thrown out. The main contention raised is that he is not confirmed in the transferee Department and therefore, his lien is still retained in the parent Department. But, he can go back, relying on his lien, if only the conditions contained in

Rule 8 and G.O.(Ms) No.4/61 are satisfied. As the petitioner's case is squarely covered by the 4th proviso to Rule 8 of K.S. & S.S. R., I find nothing illegal with Ext.P7 communication, rejecting his application for repatriation to his parent Department.

In the result, the Writ Petition fails and it is dismissed.

29th May,2007. K.BALAKRISHNAN NAIR, JUDGE.

Nm/